

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 13, 2009 Session

KEITH JAMES v. KRISTEN JAMES

Direct Appeal from the Circuit Court for Sullivan County
No. C37091 Hon. E.G. Moody, Circuit Judge

No. E2008-01696-COA-R3-CV - FILED JULY 28, 2009

In this divorce action the Trial Court granted the parties a divorce and adopted a Permanent Parenting Plan for the parties' 17 month old child at the time of the divorce, which provided for the mother to be the primary care giver, and awarded visitation to the father.

The father has appealed, seeking more visitation than the Trial Court allowed. Upon consideration of the issue, we hold the Trial Court did not abuse its discretion in the visitation awarded and affirm the Trial Court's Judgment.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Douglas R. Beier, Morristown, Tennessee, for appellant, Keith James.

Edward Kershaw, Greeneville, Tennessee, for appellee, Kristen James.

OPINION

Plaintiff, Kristen James ("mother"), filed a Complaint seeking a divorce from defendant Keith James, Jr. ("father") on December 14, 2006. The Complaint alleged the parties married on June 22, 2002, and separated on May 29, 2006, and that the parties had one child, a daughter, who was born on December 4, 2006. The mother alleged the parties had irreconcilable

differences. The father answered admitting the parties had irreconcilable differences, but sought co-parenting time.

The Court conducted an evidentiary hearing, where the parties and several witnesses testified.

At the conclusion of the evidentiary hearing, the Trial Court entered very specific findings regarding each of the statutory factors concerning custody and co-parenting. The Court found that considering all of the factors, especially the age of the child, the need for stability for the child, her age, the distance involved, and the fact that she would be attending kindergarten in a few years, it would be in the child's best interest to give the father visitation every other weekend.

The Trial Court adopted the parties' MDA and incorporated the same by reference, and the Court stated that the parties stipulated to entry of a divorce, and then made specific findings regarding parenting of the child. The Court found that both parents loved the child, but the mother had been more disposed to provide for the child's medical needs. The Court found the child was 17 months old and had been living with the mother in a stable, satisfactory environment her entire life. The Court said the mother had excellent extended family that helped her care for the child's needs, and the mother had the child enrolled at an enrichment center that was a good, positive environment for the child.

The court noted that it was concerned that the father had little or no contact with the enrichment center, and that both parents had family units that were positive for the child. The Court said the mother's family had been more apt to encourage the father's relationship with the child than the father's family had been with the mother. The Court said that in viewing both parents testifying, the mother was the more credible of the two, and the Court was concerned the father had not paid the medical and daycare costs that he had agreed to pay. The Court ordered the father to pay \$1,019.00 in medical costs and \$2,733.00 in daycare costs within 45 days of entry of the order. The Court also ordered the father to pay back child support in the amount of \$1,290.00. The Court then awarded the mother primary custody of the child, and incorporated the Permanent Parenting Plan.

Under the Permanent Parenting Plan the father was given 90 days with the child per year, and was given visitation with the child from 7:30 on Friday to 7:30 on Sunday every other weekend, plus some holidays. The father was also given 4 non-consecutive weeks with the child in the summer.

The father has appealed, and the issue on appeal is whether the Trial Court erred in ordering that the appellant should have co-parenting time of only 48 hours every two weeks.

As the Supreme Court has stated:

. . . the standard for appellate review of a trial court's child visitation order is controlled by our decision in *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988).

There, we noted that “ ‘the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge.’ ” *Id.* at 429 (*quoting Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). Accordingly, we held that a “trial court’s decision [on visitation] will not ordinarily be reversed absent some abuse of that discretion.” *Id.*

In reviewing the trial court’s visitation order for an abuse of discretion, the child’s welfare is given “paramount consideration,” *id.* (*quoting Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983)), and “the right of the noncustodial parent to reasonable visitation is clearly favored.” *Id.* Nevertheless, the noncustodial parent’s visitation “may be limited, or eliminated, if there is definite evidence that to permit ... the right would jeopardize the child, in either a physical or moral sense.” *Id.* (*quoting Weaver v. Weaver*, 37 Tenn. App. 195, 261 S.W.2d 145, 148 (1953)).

Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001). The Court went on to explain:

It is not the function of appellate courts to tweak a visitation order in the hopes of achieving a more reasonable result than the trial court. Appellate courts correct errors. When no error in the trial court’s ruling is evident from the record, the trial court’s ruling must stand. This maxim has special significance in cases reviewed under the abuse of discretion standard. The abuse of discretion standard recognizes that the trial court is in a better position than the appellate court to make certain judgments. The abuse of discretion standard does not require a trial court to render an ideal order, even in matters involving visitation, to withstand reversal. Reversal should not result simply because the appellate court found a “better” resolution. *See State v. Franklin*, 714 S.W.2d 252, 258 (Tenn. 1986) (“appellate court should not redetermine in retrospect and on a cold record how the case could have been better tried”); *cf. State v. Pappas*, 754 S.W.2d 620, 625 (Tenn. Crim. App. 1987) (affirming trial court’s ruling under abuse of discretion standard while noting that action contrary to action taken by the trial court was the better practice); *Bradford v. Bradford*, 51 Tenn. App. 101, 364 S.W.2d 509, 512-13 (1962) (same). An abuse of discretion can be found only when the trial court’s ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal

standards to the evidence found in the record. *See, e.g., State ex. rel Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000).

Id. at 88.

The father argues the Trial Court placed too much emphasis on the child's daycare situation in devising the visitation schedule, and should have granted the father more time with the child. While the Court did mention that it was impressed with the testimony regarding the Enrichment Center, this was not the only factor the Court relied upon in making its decision. The Trial Court carefully examined each of the statutory factors and made specific findings regarding the parents' bond with the child, the stability of her home environment and the homes of each parent, and the ability of each one to provide for her needs.

The Trial Court heard a great deal of testimony regarding the parties' time spent caring for the child and their parenting abilities/shortfalls. For example, the Trial Court heard that the father seemed somewhat less than interested in having a baby initially, and that he had also been less than interested in investigating the child's daycare situation or talking with her doctors regarding her medical care. The father testified that the child's needs were most important, but admitted that he had purposefully moved some distance away from the child and the mother, that he had not paid the daycare costs or medical expenses that he agreed to pay. He also admitted that he had unilaterally made decisions regarding her care that negatively impacted upon her health.

To change a visitation schedule would require finding the Trial Court abused its discretion, which is not evidenced in this record. An abuse of discretion should be found "only when the Trial Court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id. Eldridge*. The Trial Court's ruling in this case does not fall outside this spectrum, and the evidence does not preponderate against the Trial Court's factual determination. Tenn. R. App. P. 13(d).

Finally, the father argues the Trial Court arbitrarily awarded him standard visitation rather than considering the factors in Tenn. Code Ann. §36-6-101 and §36-6-404. We reiterate the Court did specifically consider the statutory factors and discussed the same in its Opinion. Reviewing the relevant factors in the statute, it is clear the mother and father were both bonded to the child and both could provide for the child's needs, but the mother had been more disposed to providing for the child's medical needs than the father. The mother had been the primary care giver for the child since her birth, and the mother had a greater "past and potential for future performance of parenting responsibilities", given her daily care for the child and her greater concern for her medical needs. The mother was favored in the analysis because of the stability of the home environment and need for stability in her schedule and the child's school.

The Trial Court also noted the child would be starting kindergarten in a few short years and that the parenting plan it adopted would minimize the need for future modification, which is also a relevant factor to consider. The Court properly considered that the mother had taken the

greater responsibility for performing parenting responsibilities relating to the daily needs of the child, and that she and her family had exhibited a great willingness and ability “to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child”. Tenn Code Ann. §36-6-404. Thus, considering the evidence on the statutory factors, the Trial Court’s determination did not “appl[y] an incorrect legal standard, or reach a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *Id. Eldridge*.

The Trial Court did not abuse its discretion, and we affirm the Court’s ruling on this issue. The cause is remanded with the cost of the appeal assessed to Keith James.

HERSCHEL PICKENS FRANKS, P.J.